STATE OF MICHIGAN

IN THE SUPREME COURT

IN RE: PROPOSED ADMINISTRATIVE ORDER REGARDING ASBESTOS-RELATED DISEASE LITIGATION

ADM File No. 2003-47

_____/

MEMORANDUM OF AMICI CURIAE,

THE COALITION FOR LITIGATION JUSTICE, INC.,
MICHIGAN MANUFACTURERS ASSOCIATION,
MICHIGAN CHAMBER OF COMMERCE,
MICHIGAN LUMBER AND BUILDING MATERIALS ASSOCIATION,
NATIONAL ASSOCIATION OF MANUFACTURERS,
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS,
NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION,
AMERICAN TORT REFORM ASSOCIATION,
AMERICAN CHEMISTRY COUNCIL,
AMERICAN PETROLEUM INSTITUTE
AMERICAN INSURANCE ASSOCIATION,
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA,
MOTOR & EQUIPMENT MANUFACTURERS ASSOCIATION,
INTERNATIONAL SAFETY EQUIPMENT ASSOCIATION,
AND WASHINGTON LEGAL FOUNDATION,

IN SUPPORT OF THE FEBRUARY 23, 2006 PROPOSED ADMINISTRATIVE ORDER REGARDING ASBESTOS-RELATED DISEASE LITIGATION

Victor E. Schwartz
Mark A. Behrens
SHOOK, HARDY & BACON L.L.P.
600 14th Street, NW, Suite 800
Washington, DC 20005
(202) 783-8400

Paul W. Kalish
Mark D. Plevin
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20005
(202) 624-2500

Frederick R. Damm (Bar No. P12462)*
CLARK HILL PLC
500 Woodward Avenue, Suite 3500
Detroit, MI 48226-3435
(313) 965-8300

* Counsel of Record

Of Counsel:

Robert L. Hood
WILLINGHAM & COTÉ, P.C.
University Place
East Lansing, MI 48823
(517) 351-6200
Counsel to the Michigan Lumber and Building Materials Association

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Karen R. Harned
Elizabeth A. Gaudio
NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2061

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

Lynda S. Mounts
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Avenue, NW, Suite 1000
Washington, DC 20036
(202) 828-7100

Marc L. Fleischaker
ARENT FOX KINTNER PLOTKIN & KAHN
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 857-6053
Counsel to the Motor & Equipment Manufacturers Association

John S. Stadler
NIXON PEABODY LLP
101 Federal Street
Boston, MA 02110
(617) 345-1000
Counsel to Washington Legal Foundation

Jan Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

George W. Keeley
KEELEY, KUENN & REID
150 North Wacker Drive, Suite 1100
Chicago, IL 60606
(312) 782-1829
Counsel to the National Association of Wholesaler-Distributors

Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW, Suite 400
Washington, DC 20036
(202) 682-1163

Harry M. Ng
Lakeisha R. Harrison
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005
(202) 682-8260

Ann W. Spragens
Robert J. Hurns
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

Daniel J. Popeo
Paul D. Kamenar
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

I. INTRODUCTION

On behalf of the Coalition for Litigation Justice, Inc., and other interested parties listed above, we appreciate the opportunity to provide comments on the Court's Proposed Administrative Order Regarding Asbestos-Related Disease Litigation. As leading business organizations that represent or insure defendants in Michigan asbestos cases, and as public policy organizations, we have a substantial interest in the Court's proposed Order. We have joined together to strongly support this Court's efforts to develop a fair and workable solution to Michigan's asbestos litigation problem.

In 2003, we filed a memorandum with this Court in support of a petition seeking the establishment of an inactive docket. At that time, we emphasized that (1) mass filings by non-sick plaintiffs, in this State and elsewhere, and often generated by for-profit litigation screenings, threatened payments to the truly sick, (2) the proliferation of cases filed by non-sick plaintiffs had contributed to numerous asbestos bankruptcies, and (3) in order to address these problems, a number of courts had adopted inactive dockets or similar case management tools that had proven both sound and effective. We attached to that prior submission various materials that demonstrated both the need for and effective use of such case management mechanisms.

The reasons for implementing a similar mechanism in this State still exist today, and we fully support this Court's efforts to address the asbestos-litigation crisis through either of its Alternatives. We provide these additional comments now simply to emphasize three points:

First, it is clear that the Court has the inherent authority to control its own docket and adopt either proposed Alternative.

Second, some form of inactive docket or administrative dismissal procedure remains essential. Court resources continue to be diverted from sick plaintiffs in favor of unimpaired

claimants by the sheer volume of cases clogging the courts – a problem exacerbated by the widespread use of mass screenings to generate unimpaired claims. Defendants continue to be forced to litigate meritless claims. And while some apparently may argue that the two Alternatives are either unnecessary or will be difficult to implement in this State, in fact, (1) most Michigan asbestos claims are filed on behalf of unimpaired, asymptomatic, individuals who often receive payments because the volume of claims the courts must handle prevents them from being resolved on the merits, and (2) inactive dockets and similar mechanisms have functioned smoothly and effectively in a variety of jurisdictions for nearly 20 years.

Third, while we believe that either Alternative set forth in the Court's proposed Order would improve asbestos-related disease litigation in Michigan by distinguishing between sick and non-sick asbestos plaintiffs and prioritizing the progression of cases on that basis, as between the two proposals, we believe that Alternative A does a much better job of focusing the parties' resources on the claims of the truly sick. Further, while we strongly support the prohibition contained in both Alternatives against joinder of impaired and unimpaired claims, we believe that this Court should go one step further and explicitly prohibit the consolidation of cases for trial even within either the active docket or Tier I unless all parties agree or the claims relate to the exposed person or the claims relate to the exposed person and members of his or her household.

II. ANALYSIS

A. The Court Has Authority To Adopt Either Alternative.

Article 6 of the Michigan Constitution authorizes this Court to take steps to better manage the asbestos cases filed in the Michigan courts. The Supreme Court is expressly granted "general superintending control over all courts" in the State (Const 1963, art 6, §4), including

promulgation of rules that "establish, modify ... and simplify the practice and procedure" of all state courts (Const 1963, art 6, §5). Indeed, the Court's existing rules already contemplate prioritization of cases. *See* MCR 2.501(B) (prioritizing trials involving custody contests and "other actions afforded precedence by statute or court rule.") The alternative approaches set forth in the proposed Administrative Order properly exercise the Court's authority and, in fact, are precisely the type of procedural tool long considered part and parcel of the judicial function. *See Landes v North American Co,* 299 US 248 (1936) (courts possess inherent authority to control their dockets, including the power to stay cases brought before them).[1]

Both Alternatives in the proposed Order do simply that, by prioritizing cases brought by plaintiffs who can meet the ABA criteria over those who cannot. Moreover, establishing a consistent state-wide procedure for prioritizing asbestos litigation, and centralizing the management of such litigation, the Court's adoption of either of the two Alternatives would avoid disparities between counties. Equally important as what the proposed Alternatives do, is what they do not do. They do not deprive any plaintiff the opportunity to file a lawsuit or otherwise impair any other substantive right. They simply direct the Court's limited resources to address more urgent cases first. Thus, whether unimpaired asbestos plaintiffs even have a cause of action under Michigan law – by no means a foregone conclusion – is beside the point.[2] The

---

[1] *See generally* Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 Rev. Litig. 253 (2005).

[2] Although this Court has not yet had the opportunity to address the issue, in a number of states, courts have held that a physically unimpaired asbestos claimant is not injured and does not have a legally compensable claim as a matter of substantive law. These include courts in Arizona, Delaware, Maine, Maryland, and Pennsylvania. Federal courts interpreting Hawaii and Massachusetts law have reached the same conclusion. The Supreme Judicial Court of Maine, in *Bernier v Raymark Industries, Inc*, for example, was the first state high court to hold that "the subclinical injury resulting from [asbestos] inhalation is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action." 516 A2d 534, 543 (Me 1986). The court held that "[t]here is generally no cause of action in tort until a plaintiff has suffered an identifiable, compensable injury." *Id.* at 542. An Arizona appellate court in *Burns v Jaquays Mining Corp* concurred, stating that it would be impossible to determine appropriate damages without a manifest injury. 591 P2d 28, 29-30 (Ariz Ct App 1988), *review dismissed*,

proposed Alternatives simply impose a process – determining when certain categories of plaintiffs will proceed.

Michigan would not be forging new ground by adopting either Alternative. Courts throughout the country have adopted similar procedures for dealing with the asbestos litigation crisis,[3] with inactive dockets repeatedly held to constitute appropriate procedural tools for administering the judicial function. As one court explained, an inactive docket

> demonstrates a traditional exercise of the court's authority to control its docket. We recognize that registries for unimpaired claimants may serve as appropriate procedural mechanisms for trial courts to manage and control their own dockets. This order may be characterized as administrative in its function, as a means by which the procedural details of litigation are regulated....

In re Cuyahoga County Asbestos Cases, 713 NE2d 20, 25-26 (Ohio Ct App 1998). In response to challenges that an inactive docket effectively enjoins an unimpaired plaintiff from litigating its case, the Illinois Court of Appeals in *In re Asbestos Cases*, 586 NE2d 521, 524 (Ill App Ct 1991) reached a similar conclusion:

> We believe that the order [establishing the inactive docket] is best characterized as a ministerial or administrative one because it regulates the procedural details of

---

781 P2d 1373 (Ariz 1989). In *Simmons v Pacor, Inc*, the Pennsylvania Supreme Court further specified that "asymptomatic pleural thickening is not a compensable injury which gives rise to a cause of action." 674 A2d 232, 237 (Pa 1996).

[3] Similar mechanisms have been adopted by courts in Cuyahoga County, Ohio (March 2006), Minnesota (June 2005), St. Clair County, Illinois (February 2005), Portsmouth, Virginia (August 2004), Madison County, Illinois (January 2004), Syracuse, New York (January 2003), New York City (December 2002), Seattle, Washington (December 2002), Massachusetts (September 1986), Cook County, Illinois (March 1991), and Baltimore City, Maryland (December 1992). Cases have been administratively dismissed in the federal asbestos MDL based on medical criteria for a number of years, with cases initiated through mass screenings specifically dismissed. *See In re Asbestos Prods Liab Litig* (No VI), MDL 875, Civ Action No 2 (Maritime Actions), Order, *In re Asbestos Prods Liab Litig* (No VI), 1996 WL 239863, *5 (ED Pa May 2, 1996) (calling unimpaired claims "a waste of the Court's time" and that "[o]ther victims suffer while the Court is clogged with such filings."); *In re Asbestos Prods Liab Litig* (No VI), MDL 875, Admin Order No 8 (ED Pa Jan 14, 2002). *See also* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*. 54 Baylor L Rev 331 (2002); James A. Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned a Corner?*, 20:23 Mealey's Litig Rep: Asbestos 19 (Jan 10, 2006); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv JL & Pub Pol'y 541 (1992).

> litigation made complex because of numbers. Given the number of cases presently in the system, delay in litigating the claims is inevitable. Thus, the registry is a tool whereby the court may prioritize the litigation of cases already filed and an example of the court exercising its inherent authority to control its docket.

Thus, the question is not whether asbestos cases will be delayed, but whose. It is not filing trends per se, but the sheer volume of cases in the face of finite court resources that clogs the courts and requires a better approach to case management that directs those limited resources to the truly sick first.

Finally, enacting a court rule to prioritize cases does not intrude upon the province of the Legislature – which specifically assigned to the Courts the power to make rules concerning the management of cases. That the Legislature presumably could modify or otherwise address the criteria adopted by this Court (though that has *not* happened in any other state where the courts have established an inactive asbestos docket), does not mean this Court is frozen until the Legislature acts. Where, as here, the State Constitution expressly assigns to the Courts the power to make rules, and where such rules involve, so centrally, the administration of justice within the judicial system itself, the Legislature need not act *first* in order to preserve the checks and balances embedded in the State system of government.

In sum, this Court has the inherent power to regulate its own docket through either of its two Alternatives. Should circumstances change, should any given claim mature, should the Legislature create an alternative means of resolving these cases, the Court can make any modifications that may be necessary.

B. Prioritization Remains Essential.

Unfortunately, the asbestos litigation problem is still substantial, fueled by mass screenings used to generate the volume of unimpaired claims that continue to deplete court

resources. Up to ninety percent of new asbestos-related claims nationwide are filed by plaintiffs with little or no impairment.[4]

The prioritization contemplated by the Court's Alternatives is still essential. Indeed, just a few months ago, the Ohio court overseeing tens of thousands of asbestos cases adopted an inactive docket for pending asbestos cases. As that court explained: "The purpose of placement on the Inactive Docket shall be to allow the Court and parties to focus the limited resources of the Court on the work-up and trial of the more serious cases as defined in this Order and other Orders of this Court." Order of the Court Regarding Prioritization of Non-Malignant Cases for Trial, Special Docket No. 73958 (Cuyahoga Cty Asbestos Cases Mar 22, 2006).

These same concerns were at the core of the recommendations of the American Bar Association Commission on Asbestos Litigation ("Commission") on which this Court's two Alternatives are founded. *See* Am Bar Ass'n Comm'n on Asbestos Litig, *Report to the House of Delegates* (2003). The Commission found that:

> Asbestos-related cancer and impairing asbestosis continue to occur, but they represent a small fraction of annual new filings.... In sum, it appears that a large and growing proportion of the claims entering the system in recent years were submitted by individuals who have not incurred an injury that affects their ability to perform activities of daily life.

Id. at 7. The Commission confirmed that unimpaired claims generally arise from for-profit screening companies whose sole purpose is to identify large numbers of people with minimal x-ray changes "consistent with" prior asbestos exposure as the pretext for lawsuits: "Some x-ray readers spend only minutes to make these findings, but are paid hundreds of thousands of dollars

[4] *See, e.g.*, Stephen J. Carroll *et al.*, *Asbestos Litigation* 76 (RAND Inst for Civil Justice 2005), *available at* http://www.rand.org/publications/MG/MG162 ("RAND Rep."); Am Acad of Actuaries, *Current Issues in Asbestos Litigation* (Feb. 2006), *at* http://www.actuary.org/pdf/casualty/asbestos_feb06.pdf.

– in some cases, millions – in the aggregate by the litigation screening companies due to the volume of films read." *Id.* at 8. The Commission reported that the rate of "positive" findings (*i.e.*, findings consistent with prior asbestos exposure) generated by litigation screening companies is "startlingly high," often exceeding fifty percent and sometimes reaching ninety percent. *Id.*

Since we filed our original submission with this Court, a number of events have further exposed the problems posed by these for-profit screenings, further demonstrating why the types of mechanisms this Court has proposed are more important now than ever before:

1. The Gitlin Study

In 2004, researchers at Johns Hopkins University described the inherent unreliability of asbestos claims generated by mass screenings.[5] The researchers compared the x-ray interpretations of B Readers employed by asbestos plaintiffs' counsel with the subsequent interpretations of six independent B Readers who had no knowledge of the x-rays' origin. The study found that for a group of 492 plaintiffs, the B Readers hired by plaintiffs found asbestos-related lung abnormalities on the x-rays 95.9% of the time, whereas the independent B Readers found such abnormalities on the same x-rays only 4.5% of the time.[6] The study concluded that the magnitude of that difference was "too great to be attributed to inter-observer variability."[7]

---

[5] *See* Joseph N. Gitlin, et al., *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 ACAD RADIOLOGY 843 (Aug 2004).

[6] *Id.* at 855. More to the point, with regard to cases pending in Michigan, it turns out that one of the B Readers whose x-ray interpretations came into question in the Johns Hopkins study is Dr. Kazerooni, Letter to the Clerk from Robert S. Krause, In re Petition for Admn Order or Court Rule Estab Inactive Docketing System and Attached Affidavit (Aug 16, 2004) -- a doctor who has been identified as a diagnosing physician in a very large percentage of the non-malignancy cases currently on the Michigan trial docket. The study of course was not intended to be a review of a random sample of x-rays but a look at how a blind panel of B-readers unconnected to litigation interpreted a selection of x-rays reviewed by B-readers who were involved with litigation.

[7] *Id.* at 852, 843.

2. Screenings Used to Generate Silica Claims

The recent decision by Judge Janis Graham Jack of the United States District Court for the Southern District of Texas also raised serious questions regarding the methods used to generate claims through mass screenings. Using the same screening procedures (and in many cases the same doctors and screening companies) used to generate asbestos claims, for-profit screeners misread x-rays to advance the litigation interests of the claimants; a dozen screening doctors came up with over 9,000 "silicosis" claims apparently missed by 8,000 treating physicians. One of the most remarkable statistics presented to Judge Jack was that over 6,000 of the 10,000 silicosis plaintiffs before her had also filed asbestos-related claims, even though, according to the medical experts who testified, the number of silica claimants who also had made an asbestos-related claim was "stunning and not scientifically plausible."[8] Judge Jack ultimately concluded that "a golfer is more likely to hit a hole-in-one than an occupational medicine specialist is to find a single case of both silicosis and asbestosis."[9]

3. More Recent Scrutiny of "Unreliable" Mass Screening Practices

Mass litigation screening practices have come under scrutiny in a variety of other contexts. The U.S. Attorney's Office in the Southern District of New York (Manhattan) has convened a federal grand jury to consider possible criminal charges arising out of the federal

---

[8] *See, e.g., In re Silica Prods Liab Litig*, 398 FSupp2d 563, 629 (SD Tex 2005) (quoting Dr. John Parker, former administrator of NIOSH's B reader program).

[9] *See id.* at 603. Judge Jack also noted the overall impact of the for-profit screenings: "Defendant companies pay significant costs litigating meritless claims. And what harms these companies also harms the companies' shareholders, current employees, and ability to create jobs in the future. And potentially, every meritless claim that is settled takes money away from Plaintiffs whose claims have merit. And not only are those with meritorious claims denied just compensation, they are potentially denied full and meaningful access to the courts." *Id.* at 636. These concerns have equal force with regard to Michigan asbestos litigation.

silica litigation.[10] The Claims Resolution Management Corporation (which manages the Manville Personal Injury Settlement Trust), the Eagle-Picher Personal Injury Settlement Trust and the Celotex Asbestos Settlement Trust have each stated that they will no longer accept asbestos reports prepared by the doctors that were the subject of Judge Jack's opinion. And in March 2006, the Ohio court overseeing asbestos claims administratively dismissed all cases filed on the basis of B-readings provided by two of the doctors involved in mass screenings.[11] Congress is looking into screening abuses as well.[12]

4. The Problems Exist in Michigan

Michigan continues to be faced with the same problem as other jurisdictions that have adopted case management tools to handle the magnitude of asbestos filings in their courts. For example, the number of pending cases in Wayne County jumped from 550 in 1999 to approximately 1500 at the end of 2002 and more than 1,000 new asbestos suits were filed in the Michigan courts, on average, from 2000-2005. Of those cases, we understand that up to 90% of the claimants have little or no physical impairment and that at least 80% of the cases that have been placed on the Michigan trial dockets through April 2007 involve "asbestosis" or other non-malignant claims that would be the subject of the medical criteria in the two Alternatives. Indeed, Michigan continues to be just one of a small number of states where large numbers of cases continue to be filed on the basis of screenings. Moreover, some of the largest employers in Michigan are falling victim to the new wave of asbestos litigation, *see, e.g.,* Mark Truby,

---

[10] *See* Jonathan D. Glater, *Lawyers Challenged on Asbestos*, NY TIMES, July 20, 2005, at C1, *available at* 2005 WLNR 11332864.

[11] Order of the Court Regarding Prioritization of Non-Malignant Cases for Trial, Special Docket No. 73958 (Cuyahoga Cty Asbestos Cases Mar 22, 2006) (Drs. Harron and Ballard).

[12] *See* Press Release, *Barton, Whitfield Query Physicians Regarding Silicosis*, Aug 2, 2005, *at* http://energycommerce.house.gov/108/News/08022005_1619.htm. Initial hearings were held earlier this year.

Asbestos Suits Haunt Carmakers, Detroit News, Mar 31, 2002, at A1, *abstract available at* 2002 WL 118054077, and there are still nearly 250 companies named as defendants in Michigan asbestos cases.

Because of the volume of claims, the focus of the Michigan courts has, not surprisingly, been on settlement. But that settlement focus means the relative merit of the unimpaired cases (often generated by litigation screenings) are never addressed. As a result, the current system unfairly encourages payments by defendants to unimpaired, asymptomatic claimants, further eroding the amounts available for the truly sick. And a system focused on settlement, rather than the merits of the claims, encourages the filing of claims by more and more unimpaired plaintiffs. This Court can and should prioritize and stay unimpaired, highly debatable cases, if proceeding with such cases would prevent claimants, who are near death – and whose source of recovery might evaporate because a defendant might become bankrupt – from prosecuting and trying their cases. And by putting aside the unimpaired cases, the Court would also address the inherent unfairness faced by defendants, including Michigan companies, in the current litigation environment.

In sum, in the absence of procedures to prioritize the volume of asbestos cases in Michigan, the "asbestos-litigation crisis" will continue. And, the questionable legitimacy of unimpaired filings generated by the use of mass screenings renders a case management tool based on medically appropriate criteria all the more imperative.

C. The Court's Alternatives.

We believe that the use of an inactive docket or similar case management tool as set forth in the Court's Proposed Administrative Order would improve the current system by:

- giving priority to the sick by allowing them to move "to the front of the line" and not forcing them to wait until claims by unimpaired individuals are resolved;
- adopting widely-accepted medically appropriate criteria for determining which litigants are actually sick;
- prohibiting the leveraging of sick plaintiffs by unimpaired plaintiffs;
- deferring, while still preserving, cases filed by litigants who are not sick – but who may become sick in the future; and
- reducing the time and money spent by defendants forced to litigate meritless claims.

While both Alternatives address these important goals, we believe that Alternative A does a much better job of achieving them. More specifically, we believe that the explicit suspension of proceedings (including discovery) in unimpaired cases is critical to preserving resources aimed at resolving the cases of the truly sick. Although not addressed in either Alternative, another approach the Court could consider would be the administrative dismissal of unimpaired cases, using the same medical criteria, with a tolling of the statute of limitations to preserve for non-sick plaintiffs the opportunity to litigate should they ever meet the Court's medical criteria.

Also critically, both proposals prohibit joinder of cases from the active docket with cases from the inactive docket "for settlement or any other purpose." (Alternative A, ¶ 7; Alternative B, ¶ 8.) This provision recognizes the prejudicial effect that results from consolidating cases with disparate facts, in particular, unimpaired claimants and impaired claimants.[13]

[13] Former Michigan Supreme Court Chief Justice Conrad L. Mallett, Jr. described how trial judges inundated with asbestos claims might feel compelled to shortcut procedural rules as a result:

Indeed, the Court may want to further that goal by similarly prohibiting the consolidation of cases for trial even within the active docket or Tier I. The Court could add a provision to either Alternative to permit consolidation of asbestos claims for trial only with the consent of all parties, unless the claims relate to the exposed person and members of his or her household. Such a provision would permit the trial to focus on the merits of each individual claim, without permitting one claim to prejudice the settlement or judgment of another.

Finally, it is worth noting that to the extent that some may argue that implementation of one of the Alternatives will somehow have a negative impact on Michigan asbestos litigation, the 20 year history of inactive dockets in other jurisdictions belie such concerns. Courts in those jurisdictions, while focusing on the claims of the truly sick, have not seen an increase in the cases that ultimately go to trial. Indeed, judges intimately involved with such procedures have praised their effectiveness. *See Unimpaired Asbestos Dockets: Are They Easing the Flow of Litigation*?, COLUMNS – RAISING THE BAR IN ASBESTOS LITIG, Feb 2002, at 2 (Judge Hiller Zobel in Massachusetts describes the Massachusetts inactive docket as "really a very good system that has worked out."); *In re Pers Injury and Wrongful Death Asbestos Cases*, No. 24-X-92-344501, at 5 (Baltimore City Cir Ct, Md Aug 15, 2002) (Memorandum Opinion and Order Denying Modification to Unimpaired Docket Medical Removal Criteria) (Baltimore City Circuit Court Judge Richard Rombro stating that "the docket is working"). Even plaintiffs' lawyer John Simmons said that Madison County's unimpaired docket has been "a win-win" - if unimpaired

---

> Think about a county circuit judge who has dropped on her 5,000 cases all at the same time . . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The judge does not purposely ignore fairness and truth, but the demands of the system require speed and dictate case consolidation even where the rules may not allow joinder.

The Fairness in Asbestos Compensation Act of 1999, Hearings on HR 1283 Before the House Comm on the Judiciary, 106th Cong at 6 (July 1, 1999) (statement of the Hon. Conrad L. Mallett, Jr.).

claimants "never get sick, they never get paid, and that's the best scenario. And [the inactive docket] preserves the dollars that are going to be spent on settlements for those who are truly deserving."[14] Indeed, a 2005 RAND report called the "reemergence of deferred dockets as a popular court management tool" one of the "most significant developments" in asbestos litigation.[15]

III. CONCLUSION

We support the Court's efforts to address Michigan's asbestos litigation crisis. As long as the court system is clogged with unimpaired claims, court resources continue to be diverted away from the litigants most in need. While we believe that Alternative A is better, either Alternative, through the use of medical criteria vetted by the ABA Commission on Asbestos Litigation and case management tools that have proven to be sound and effective in other jurisdictions, implements a process that ensures that claimants who may never become sick do not siphon off resources from those who are.

Respectfully submitted,

CLARK HILL PLC

By: 

Frederick R. Damm (P12462)
500 Woodward Ave., Suite 3500
Detroit, MI 48226-3435
(313) 965-8300
Attorneys For Amici Curiae

Date: May 23, 2006

[14] Paul Hampel, *Lack of Trust Poisons Efforts to Reform Asbestos Litigation*, ST. LOUIS POST-DISPATCH, Sept 22, 2004, at A1, *available at* 2004 WLNR 1310972.

[15] Carroll, RAND Rep, *supra* note 4, at xx.